U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 04Oct2001

CASE NO.: 2000-LHC-913

OWCP NO.: 07-152521

In the Matter of:

VERNON J. WILLIAMS,
Claimant

against

FRIEDE GOLDMAN OFFSHORE,
Employer

and

AIGCS
Carrier

APPEARANCES:

LOUIS FONDREN, ESQ.
On behalf of the Claimant

MICHAEL McELHANEY, ESQ.
On behalf of the Employer

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Worker's Compensation Act (hereinafter "the Act"), 33 U.S.C. § 901, et seq., brought by **VERNON J. WILLIAMS** ("Claimant") against **FRIEDE GOLDMAN OFFSHORE** and **AIGCS** ("Employer") for injuries allegedly sustained during activities related to the construction of a vessel.

The issues raised here could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held February 7, 2001 at Mobile Alabama

STIPULATIONS

Prior to the hearing, the parties agreed to a joint stipulation (TX, p. 6-10):[1]

1. Jurisdiction of the Court is not a contested issue;

2. Claimant was installing power to an electrical substation on a pier;

3. The date of the Claimant's injury was May 7, 1998;

4. An employer/employee relationship existed between Claimant and Respondent at the time of the Claimant's injury;

5. Notice of controversion was filed on March 11, 1999;

6. Benefits were paid from May 8, 1998 until July 30, 1998 at the rate of $208.94 per week;

ISSUES

The parties listed the following issues as disputed on the joint stipulation:

1. The date of Claimant's maximum medical improvement;

2. The nature and extent of the Claimant's disability;

3. Payment of medical bills pursuant to section 7 of the Act;

4. Claimant's Average Weekly Wage;

[1] The following references will be used: TX for the official hearing transcript; JX-__ for Joint exhibits; CX-__ for the Claimant's exhibits; and RX-__ for Employer's exhibits.

SUMMARY OF FACTS

I. Claimant's Employment

Claimant is a 36 year old electrician with experience working with both consumer and industrial electronic devices. In the fall of 1996 he went to work for Atlantic Marine/Alabama Shipyard in Mobile. While at Atlantic Marine/Alabama shipyard the Claimant worked as a first class electrician. He had also previously worked at Ingalls Shipbuilding as a first class combination electrician. (TX, p. 74-75).

In April of 1998 Claimant was solicited by Robert Johnson to move with him over to Friede Goldman as a first class electrician. He did so and began working for Employer, Friede Goldman, in May of 1998. (TX, p. 75).

Claimant testified that his first day on the job he worked a ten hour day. At the time, he testified that workers of his classification at the Employer's facility were working five ten hour days per week for a total of 50 hours. (TX, p. 75). At the time the Claimant's hourly wage was $14.25 and he earned time and a half for hours over 40 per week. (TX, p. 76).

On May 7, less than one week after starting with the Employer, Claimant and his team were digging a trench. Claimant testified that they were working with picks and shovels. He also testified that sometime during that afternoon, perhaps around 3:30, he experienced a jolt in his shoulder and neck.[2] (TX, p. 76). Claimant testified that he told his supervisor, Ken Hodges, about the accident. He then declined medical attention from the yard medical staff. (TX, p. 77).

Claimant testified that he knew that Employer needed the trench completed soon, and so he continued to work that day despite his injury. That night, while driving home from the facility, the pain continued to get worse. When he got home he took a shower and went to take a brief nap. (TX, p. 77). About 45 minutes later the Claimant was awakened with very severe pain in his right side. He testified that the pain was in his neck and radiated down his right arm and into his fingers. (TX, p. 78). According to his testimony and his wife's, the pain was so severe that he could not speak. (TX, p. 78, 53). Claimant's wife called the paramedics and Claimant was transported to Providence Hospital by ambulance that evening. (TX, p. 79).

[2]Claimant testified that the jolt felt like a Charlie-horse, a sharp pain that set in quickly and lingered for a little while.

II. Medical Evidence

Emergency Medical Services

On the night of Claimant's injury he was transported from his home to Providence Hospital by Mobile Fire and Rescue Department's unit RA-23. (CX-6). When the ambulance arrived at the Claimant's home, they discovered him complaining of acute right side pain, but in no apparent immediate distress otherwise. The paramedics loaded him onto a stretcher and took him to the hospital where they turned him over to the emergency department staff. (CX-6).

Providence Hospital Emergency Room

Claimant was then treated by the staff of the Providence Hospital Emergency room and released. The physician who saw him at the hospital recommended that he see a neurologist, Dr. Middleton. The official diagnosis is listed as a neck strain with radiculopathy. (CX-9, p. 142). The Claimant was then discharged with prescriptions for Ultram, Flexeril, and Ibuprofen. (CX-9, p. 146). He was advised to rest at home for the next several days and to avoid work for the next three days. (CX-9, p. 146).

Dr. Middleton

Following his visit to the emergency room Claimant was seen by Dr. Middleton, a neurologist on the hospital staff. Claimant first saw Dr. Middleton on May 8. Based on his examination he thought the Claimant suffered from a herniated or ruptured cervical disk. He ordered an MRI of the Claimant's cervical spine that day. (RX-17, p. 9-10).

The results of the MRI showed a large disc rupture at the C5-6 level on the right side. (RX-17, p. 10). Claimant's complaints of severe pain and the magnitude of the disc rupture lead Dr. Middleton to recommend a cervical fusion at this level. (RX-17, p. 10-11). Dr. Middleton performed that procedure at Providence Hospital on May 19, 1998. (RX-17, p. 11).

According to Middleton's testimony the Claimant's surgery went well and the Claimant stayed in the hospital for about 24 hours following the procedure. Claimant was then discharged and returned to see Dr. Middleton about eight days later on May 27, 1998. (RX-17, p. 11). At this follow-up visit, Dr. Middleton noted that the Claimant was doing well post-surgery and was strong throughout with some residual numbness in the right arm. (RX-17, p. 11).

After the May 27, 1998 visit, Dr. Middleton put the Claimant on a one month follow-up schedule. He then saw the Claimant on June 29th and July 27th. Dr. Middleton testified that he could find nothing wrong with the Claimant at either of these visits. According to the doctor, the Claimant complained of weakness in his right arm at the July visit. Doctor Middleton testified, however, that he could find no physical signs of such weakness in the Claimant's arm. (RX-17, p. 13). At this point, considering

Claimant's recovery and condition, Dr. Middleton told the Claimant he could go back to work. (RX-17, p. 13). When Claimant voiced concerns about his ability to return to work, Dr. Middleton testified that he advised him to seek evaluation with a physiatrist. (RX-17, p. 13). Doctor Middleton testified that this was the last time he saw the Claimant. He also said that he did not know whether the claimant ever saw a physiatrist or returned to work. (RX-17, p. 14).

In Dr. Middleton's opinion, the Claimant reached Maximum Medical Improvement at the time of his last visit with Dr. Middleton on July 27, 1998. On that date Dr. Middleton told the Claimant he could return to work at his former position. The doctor also told the Claimant that he saw no reason to place the Claimant on permanent physical restrictions. (RX-17, p. 14-15). Here again, Dr. Middleton reiterates that he does not know if the Claimant ever returned to work. (RX-17, p. 15).

Dr. Crotwell

Some time after his surgery Claimant began complaining of numbness in his right arm and hand as well as weakness and a decreased range of motion in his neck. (TX, p. 99-100). Claimant testified that he reported both of these problems to Dr. Middleton and that Dr. Middleton told him there was little else he could do to help the Claimant. (TX, p. 100). Subsequently, the Claimant sought the advice of Dr. Crotwell in late March of 1999. Crotwell testified that he first saw the Claimant regarding this accident on March 30, 1999. (RX-18, p. 7).

When he saw the Claimant, Dr. Crotwell determined through his examination that the Claimant suffered from some mild arthritis and from some spurs in the neck and carpal tunnel. (RX-18, p. 13). Crotwell put the Claimant on medications and advised him to use a wrist splint for the Carpal Tunnel problems. (RX-18, p. 14). He indicated that he would defer to Dr. Middleton on the topic of work restrictions related to this condition. (RX-18, p. 15).

Doctor Crotwell saw the Claimant again on May 14, 1999. At that time the doctor testified that he revised his diagnosis and found that the Claimant was suffering from cervical stenosis and carpal tunnel as his primary problems. (RX-17, p. 15). The doctor testified that in his medical opinion the Carpal Tunnel syndrome the Claimant experienced was not related to the Claimant's work injury on May 7, 1998. He also testified that it was not related to his cervical stenosis. (RX-18, p. 17).

It is Dr. Crotwell's medical opinion that the Claimant suffers from two different injuries, a cervical stenosis and carpal tunnel. The doctor does not believe that these two injuries are related. (RX-17, p. 20). Doctor Crotwell also repeatedly testified that he would defer to Dr. Middleton for an opinion on whether the Claimant should follow any restrictions on his physical participation at work. (RX-17).

DISCUSSION

I. Jurisdiction

The parties to this case do not contest the Court's jurisdiction. The Claimant was a first class electrician at Employer's shipyard when he began to experience his neck and shoulder symptoms. His injury specifically occurred while he was helping to dig a trench through the ground at Respondent Employer's shipyard adjacent to navigable waters. The purpose of the trench was to provide electrical power for the construction of a vessel. The Court finds that the Claimant was an employee within the meaning of section 902 (3) of the Act. We also find that the Claimant was employed in a maritime location (a shipyard and dry dock) with respect to section 903(a) of the Act. *See* 33 U.S.C. § 902, 903.

II. Claimant's Prima Facie Case

To receive compensation under the Act, the Claimant must make out a prima facie case that he was injured within the course and scope of his employment and that this injury has resulted in a disability. In order to make out the prima facie case, the Claimant must demonstrate that he suffered some harm or pain. *See Murphy v. SCA/Shayne Brothers,* 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir 1979). The Claimant must also demonstrate that an accident occurred or working conditions existed which could have caused the pain or harm. *See Kelaita v. Triple A. Mach. Shop,* 13 BRBS 386 (1981).

In this case the Claimant asserts that he suffered an injury to his right shoulder and neck as a result of the digging he performed while working for the employer. When we dissect this claim the Court is satisfied that the Claimant has made out both parts of the prima facie case.

Claimant suffered harm or pain as a result of his work. He testified that the pain was so severe that he could not speak. He had to be rushed to the hospital by ambulance. (TX, p. 77-79; TX, p. 53). When Claimant arrived at the hospital and was eventually referred to Dr. Middleton by the emergency department staff it was determined that the Claimant was suffering from a ruptured disk at the C5-6 level and that he would require surgery to correct this problem. (RX-17, p. 10-11). Subsequently Dr. Middleton performed this procedure. (RX-17, p. 11).

There is also evidence sufficient to indicate that working conditions existed that could have caused this harm or pain. Claimant testified that he was engaged in digging a trench when he felt a sharp pain in his shoulder and neck akin to a Charlie-horse. At the time, Claimant and his crew were working with picks and shovels to complete the trench work. (TX, p. 76). The Court is convinced that working with picks

and shovels is heavy physical labor sufficiently strenuous that it could cause a person to suffer from harm or pain of the type the Claimant described. Therefore the Court finds that the Claimant has made out his prima facie claim in this case.[3]

Once the Claimant has met his burden and the presumption is invoked, it is Employer's burden to go forward with substantial evidence that the injury did not arise out of the Claimant's employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082, 4 BRBS 466, 475, (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). In this case, the Court finds that the Employer has presented no evidence that tends to rebut the presumption.

Employer presents no evidence tending to rebut the conclusion that the Claimant's neck injury was caused by the heavy physical labor in which he engaged. The only evidence presented by the Employer is the testimony of Dr. Crotwell. While the Court finds this testimony helpful in distinguishing between the compensable cervical injury suffered by Claimant and the non-compensable carpal tunnel injury, we do not find it persuasive enough to rebut the presumption in favor of compensability for the Claimant's neck injury.

III. Maximum Medical Improvement

The parties also dispute the date on which Claimant reached maximum medical improvement. Employer argues that we should find that Claimant reached MMI on July 27, 1998. This is consistent with Dr. Middleton's testimony that Claimant reached MMI as of that date. (RX-17, p. 14-15).

Claimant by contrast, argues in his rebuttal brief that we should not find July 27, 1998 to be the date of MMI. Claimant asserts that Dr. Middleton was still prescribing physical therapy to reduce the Claimant's pain on that date, hence, he could not have believed the Claimant was at MMI. Claimant proposes no alternative date at which MMI could be found and no evidence to support another conclusion.

Based on the evidence presented, the Court finds that the Claimant reached MMI for his compensable shoulder injury as of July 27, 1998.

IV. Nature and Extent of Disability

Employer and Claimant primarily dispute the current nature and extent of the Claimant's disability. Employer urges that the Claimant is at worst partially disabled and proffers proof of suitable alternate employment. Claimant contends that he is totally disabled and that no suitable alternative is available. The

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[3]We are careful to note that this prima facie claim extends only as far as the Claimant's neck injury and ultimate cervical fusion. It is the Court's opinion that there is insufficient evidence to support the claim that Claimant's carpal tunnel or cervical stenosis are related to his work place injury. In fact, Dr. Crotwell so testified in is deposition. (RX-18, p. 17).

law holds that the Claimant's residual disability, partial or total, will be considered permanent if and when the employee's condition reached a point of maximum medical improvement. *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989).

Claimant reached MMI in this case on July 27, 1998. According to Dr. Middleton, the Claimant's treating physician, there was no residual disability on that date. The Claimant showed no objective signs of weakness and no sign that he was not fully capable of returning to work. (RX-17, p. 13). Dr. Middleton saw no reason for the Claimant to be put under permanent physical restrictions. (RX-17, p. 14).

Doctor Crotwell does not disagree with Dr. Middleton's opinion as far as the neck injury is concerned. In fact, he indicates repeatedly that he would defer to Middleton on the question of physical restrictions. (RX-18).

The Court has not received any other evidence from either party which tends to justify the conclusion that the Claimant suffers from residual disability past the point of maximum medical improvement. All of the doctors are in agreement that the Claimant's workplace injury did not result in on-going restrictions on his ability to work. Thus the Court concludes that the Claimant was at best temporarily disabled prior to his surgery.

The law declares a Claimant's disability to be total in extent when the Claimant loses the ability to earn pre-injury wages through his pre-injury employment or any other employment. Initially, the Claimant must prove that he cannot return to his previous employment. The Court must consider the Claimant's medical restrictions in comparison to the requirements of his usual job. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988). In this case, the Court finds that the Claimant is not permanently totally disabled for two reasons. First, it is our opinion based on the medical testimony and other evidence that the Claimant suffers no on-going residual disability as a result of his neck injury. Such a claim certainly has not been proven by Claimant's evidence. Second, the only evidence that the Claimant cannot continue to earn his pre-injury wage through his pre-injury employment is the Claimant's testimony that he suffers from right arm weakness which would prevent him from being able to catch himself in the event of a fall. (TX, p. 84, 99).

While the Court finds the Claimant is a credible witness, there is no independent evidence to support the conclusion that the Claimant could not return to his previous employment. Without such evidence, we cannot conclude that he is totally disabled. The Court does conclude that the Claimant was totally disabled from the time that he injured himself on the job until the time that he reached maximum medical improvement. The credible testimony of both the Claimant and his wife indicate that the Claimant was in such severe pain that he could not speak. The Court finds that this supports the conclusion that Claimant could not work until he reached maximum medical improvement. We therefore find that Claimant is entitled to temporary total disability from May 7, 1998 until July 27, 1998.

V. Section 7 Medical Expenses

Claimant also asserts that the Employer should cover the various medical expenses that he incurred as a result of this injury. Section 7 of the Act provides that the Employer shall furnish such medical services as are reasonably necessary for the process of recovery. *See* 33 U.S.C. § 907; *see also Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979).

The Court notes that a claimant makes a prima facie case for medical treatment compensation when a qualified physician indicates that the treatment was necessary for a work related condition. *See Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-8 (1984). The regulations established to administer section 7, however, require that the treatment be appropriate to the injury. *See* 20 C.F.R. § 702.402. Where the medical treatment sought is not appropriate, the Court may reject the request for payment. *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184, 187 (1988).

In the instant case, Claimant seeks compensation for a variety of medical bills. Those bills are presented to the Court as CX-1. The first few pages of this exhibit provide a helpful summary of the medical expenses for which compensation is sought. Most of these expenses are the result of Claimant's visit to the emergency room and his subsequent surgery and treatment. The Court finds that those medical expenses are reasonably necessary to the treatment of the Claimant's work place injury. Further, Employer concludes in its brief that it should pay all of Claimant's reasonable medical expenses. *See* Employer's Brief, p. 22. The Court agrees and finds that Employer should pay Claimant's reasonable and necessary medical expenses from the date of his injury until the date he reached maximum medical improvement, i.e. May 7, 1998 until July 27, 1998.

VI. Average Weekly Wage

Finally, the parties are in dispute as to the Claimant's average weekly wage. The Court does not find this an overly difficult decision to make. Section 10(a) of the Act applies if the employee "worked in the employment . . . whether for the same or another employer, during substantially the whole of the year immediately preceding" the injury. 33 U.S.C. § 910(a). Section 10(a) applies where there is evidence of the Claimant's actual wages from which an average daily wage can be calculated. *See Lobus v. I.T.O. Corp.*, 24 BRBS 137, 140 (1990). Additionally, to apply Section 10(a), Claimant must have been engaged in the employment on a permanent basis. *See Mulcare v. W.C. Ernst, Inc.*, 18 BRBS 158, 159-60 (1986).

At trial, Claimant testified that he worked a full year as an electrician for Alabama Shipyard/Atlantic Marine in 1997 as well as working January through the first week in May in 1998. (TX, p. 110). Claimant testified that he then transferred to Employer's yard as a first class electrician. (TX, p. 110). His actual

wages from this period are evidenced by his W2 forms from Alabama Shipyard and Atlantic Marine. (RX-4). These documents show that Claimant earned $27,931.45 from Alabama Shipyard/Atlantic Marine in 1997. In 1998 he earned $9,995.50 from those companies.

When we consider the amounts earned for the 52 weeks prior to the Claimant's injury, the Court determines that the Claimant earned $18,261.40 in the 170 days he worked in 1997. We also determine that the Claimant earned $9,995.50 for the 87 days worked prior to his accident in 1998. Thus, claimant's average daily wage is $108.68. His average weekly wage would then be $543.40.

Claimant contends that he would have earned a significant amount of overtime if he had continued working for the Employer. Claimant thus argues that the Court should include that amount as a consideration in our determination of Average Weekly Wage. We disagree. Although Claimant might have earned significant overtime, those earnings were by no means assured. The Board has previously declined to include in the average weekly wage overtime that might have been earned. *See McDonough v. General Dynamics*, 8 BRBS 303 (1978). Likewise, the Court refuses to include potential overtime in the calculation of Claimant's average weekly wage in this case.

ORDER

1. Employer shall pay to Claimant compensation for temporary total disability from May 7, 1998 until July 27, 1998, the date of maximum medical improvement based on an average weekly wage of $543.40;

2. Employer shall pay to Claimant compensation for medical expenses reasonably incurred in the treatment of Claimant's workplace injury from the date of the accident, May 7, 1998 until the date of Maximum medical improvement, July 27, 1998. Employer shall also compensate Claimant for any future medical expenses reasonably related to his injury[4];

3. Employer is entitled to credit for all compensation previously paid to the Claimant;

4. Employer shall pay Claimant interest on any accrued unpaid compensation benefits. The interest rate shall be equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the last auction of 52 week United States Treasury Bills as of the date this Decision and Order is filed with the District Director;

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[4]The Court notes that Claimant's post-hearing brief seeks a 10% penalty for failure to timely pay medical expenses. Claimant's Brief, p. 5. Claimant's counsel, however, cites no authority supporting such an award. Neither has the Court's own research found any support. We therefore decline to make such an award.

5. Claimant's counsel shall have 20 days from receipt of this Order in which to file an attorney fee petition and simultaneously serve a copy of the petition on opposing counsel. Thereafter, Employer shall have 20 days from receipt of the fee petition to respond to the petition.

So ORDERED.

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RICHARD D. MILLS
Administrative Law Judge